

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORCAL WASTE SYSTEMS, INC., a
California corporation,

Plaintiff,

v.

APROPOS TECHNOLOGY, INC., an Illinois
corporation; and DOES 1 through
50, inclusive,

Defendants.

No. C 06-3410 CW

ORDER DENYING
DEFENDANT'S
MOTION TO DISMISS

Defendant Apropos Technology, Inc., moves pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) to dismiss the complaint filed against it by Plaintiff Norcal Waste Systems, Inc., and, in the alternative, to strike Plaintiff's claim for punitive damages. Plaintiff opposes the motion. The matter was taken under submission on the papers. Having considered all of the papers filed by the parties, the Court denies the motion to dismiss.

BACKGROUND

Unless otherwise noted, the following facts are taken from the Complaint and are assumed to be true for purposes of this motion.

Defendant asks the Court also to consider the parties' December 23, 2004 Customer Purchase and License Agreement

(hereinafter the License Agreement), attached as Exhibit A to the Meretsky Declaration. Plaintiff does not dispute that the License Agreement is authentic and relevant to its claims, but argues that it is confidential and thus Defendant's filing violates the confidentiality clause. Plaintiff may seek to protect the License Agreement by establishing that it is privileged or protectable as a trade secret and by requesting a Court order to seal it, in whole or in part, pursuant to Civil Local Rule 79-5(a). However, Plaintiff has shown no reason why the Court should refuse to consider the License Agreement in deciding Defendant's motion. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (noting that courts may consider on a motion to dismiss documents incorporated by reference into a complaint if referred to extensively or if they form the basis for the plaintiff's claim).

Plaintiff, a California corporation, and Defendant, an Illinois corporation, entered into a written contract ("the Contract") on January 15, 2005, for a Multi-Channel Interactive Management software solution ("MCIM Solution") related to telephony voice processing to be used in Plaintiff's waste management business. While the parties were negotiating the terms of the contract, Defendant represented to Plaintiff that the MCIM Solution "contained tight integration with Plaintiff's existing telephony voice processing information." Complaint ¶ 8. Defendant's demonstrations of the product used "'canned' data, which did not accurately represent how it would work with Plaintiff's existing telephony infrastructure"; Defendant verbally indicated "that the MCIM SOLUTION would work 'seamlessly' with Plaintiff's existing

1 telephony infrastructure"; and Defendant failed to include
2 necessary hardware in its written "Customer Procurement"
3 requirements. Id. ¶ 9. Plaintiff alleges that these
4 representations regarding the MCIM Solution's ability to function
5 with Plaintiff's existing telephony voice processing infrastructure
6 were false, and that Plaintiff now finds it must "add and/or
7 upgrade hardware and/or implement VoIP."¹ Id. ¶ 14. Plaintiff
8 alleges that it reasonably relied on the false representations;
9 that they were made with a reckless disregard for their truth or
10 veracity; and that they were "mistaken and/or made with an intent
11 to deceive Plaintiff for the purpose of inducing Plaintiff into
12 entering into the CONTRACT." Id. ¶ 17. Plaintiff also alleges
13 that Defendant's failure to provide an MCIM Solution that could
14 operate using Plaintiff's existing telephony infrastructure
15 constitutes a material failure of consideration in connection with
16 the Contract.

17 Plaintiff paid Defendant \$240,080.60 in consideration for the
18 contract, as well as \$3,137.24 for additional professional
19 services. Plaintiff brings claims for (1) rescission of the
20 Contract based on fraud, mutual mistake and failure of
21 consideration; (2) intentional misrepresentation; (3) negligent
22 misrepresentation; (4) breach of the implied covenant of good faith
23 and fair dealing; and (5) a common count for money had and

24
25 ¹Voice over Internet Protocol (VoIP) is a technology that
26 allows a user to make telephone calls using a broadband Internet
27 connection instead of a regular (or analog) phone line. Federal
Communications Commission, Consumer & Governmental Affairs Bureau,
Voice Over Internet Protocol: Frequently Asked Questions,
<http://www.fcc.gov/voip/> (last visited July 21, 2006).

1 received. Plaintiff seeks general and punitive damages, as well as
2 costs and attorneys' fees.

3 In support of its motion to dismiss, Defendant notes that the
4 License Agreement contains an integration clause that provides:
5 "This Agreement sets forth the entire agreement of the parties with
6 respect to the subject matter set forth herein and supersedes any
7 and all prior agreements." License Agreement § 10.13. However,
8 other portions of the License Agreement expressly incorporate by
9 reference additional documents. According to § 5.1 of the License
10 Agreement, Defendant warrants that the software "will conform to
11 the functional specifications set forth in the Statement of Work
12 and Documentation provided by Apropos to Customer."

13 "Documentation" is defined to mean "any documentation that
14 accompanies the Software." Id. § 1.8. Neither the Statement of
15 Work nor the Documentation are part of the record before the Court.

16 Defendant also bases its motion to dismiss on the License
17 Agreement's disclaimers and limitations of warranties. Other than
18 the warranty in § 5.1, the License Agreement expressly limits
19 applicable warranties:

20 Apropos has no obligation, other than the limited warranty
21 obligations set forth in this Section 5, to support any
22 Software except as may be specifically agreed in writing by
23 Apropos in a separate agreement or in an Attachment to this
24 Agreement. Apropos does not warrant that any Software will
25 meet Customer's requirements or that operation of the Software
26 will be uninterrupted or error free.

27 License Agreement § 5.3. In addition, a disclaimer in bold, all
28 capital typeface states,

Except as expressly set forth in this Agreement, Apropos
expressly disclaims any representations or warranties, express
or implied, including any implied warranties of

1 merchantability, fitness for a particular purpose and
2 noninfringement, any implied warranties arising from course of
3 dealing or course of performance and any warranties relating
4 to the speed or proficiency with which the Software performs.

5 Id. § 6.2 (capitalization and emphasis omitted). Defendant's
6 liability is limited:

7 Under no circumstances will Apropos be liable for indirect,
8 incidental, consequential, special or exemplary damages (even
9 if Apropos has been advised of the possibility of such
10 damages) arising from this Agreement, or the use or inability
11 to use the Software

12 Id. § 6.1 (capitalization and emphasis omitted).

13 LEGAL STANDARDS

14 I. Rule 12(b)(6)

15 A motion to dismiss for failure to state a claim will be
16 denied unless it is "clear that no relief could be granted under
17 any set of facts that could be proved consistent with the
18 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th
19 Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506
20 (2002). All material allegations in the complaint will be taken as
21 true and construed in the light most favorable to the plaintiff.
22 NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

23 Although the court is generally confined to consideration of the
24 allegations in the pleadings, when the complaint is accompanied by
25 attached documents, such documents are deemed part of the complaint
26 and may be considered in evaluating the merits of a Rule 12(b)(6)
27 motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th
28 Cir. 1987).

When granting a motion to dismiss, a court is generally
required to grant a plaintiff leave to amend, even if no request to

1 amend the pleading was made, unless amendment would be futile.
2 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
3 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
4 would be futile, a court examines whether the complaint could be
5 amended to cure the defect requiring dismissal "without
6 contradicting any of the allegations of [the] original complaint."
7 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
8 Leave to amend should be liberally granted, but an amended
9 complaint cannot allege facts inconsistent with the challenged
10 pleading. Id. at 296-97.

11 II. Rule 9(b)

12 "In all averments of fraud or mistake, the circumstances
13 constituting fraud or mistake shall be stated with particularity."
14 Fed. R. Civ. P. 9(b). The allegations must be "specific enough to
15 give defendants notice of the particular misconduct which is
16 alleged to constitute the fraud charged so that they can defend
17 against the charge and not just deny that they have done anything
18 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).
19 Statements of the time, place and nature of the alleged fraudulent
20 activities are sufficient, Wool v. Tandem Computers, Inc., 818 F.2d
21 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth "what
22 is false or misleading about a statement, and why it is false."²
23 In re GlenFed, Inc., Sec. Litig., 42 F.3d 1541, 1548 (9th Cir.

24
25 ²Defendant mistakenly relies on Desaigoudar v. Meyercord, 223
26 F.3d 1020, 1022 (9th Cir. 2000) for the proposition that averments
27 of fraud must be plead with a "high degree of meticulousness"; this
28 standard refers to the requirements of the Private Securities
Litigation Reform Act.

1 1994). Scierter may be averred generally, simply by saying that it
2 existed. See id. at 1547; see Fed. R. Civ. P. 9(b) ("Malice,
3 intent, knowledge, and other condition of mind of a person may be
4 averred generally"). As to matters peculiarly within the opposing
5 party's knowledge, pleadings based on information and belief may
6 satisfy Rule 9(b) if they also state the facts on which the belief
7 is founded. Wool, 818 F.2d at 1439.

8 DISCUSSION

9 I. Rescission and Intentional Misrepresentation Claims

10 Defendant moves to dismiss Plaintiff's claims for rescission
11 and intentional misrepresentation on the grounds that (1) they rest
12 on allegations of fraudulent representations which were not
13 contained in the License Agreement, and thus evidence of those
14 representations is barred by the parol evidence rule; and (2) the
15 alleged misrepresentations are mere "sales talk" not actionable as
16 fraud. Defendant also moves to dismiss these claims on the grounds
17 that they are not plead with the particularity required by Rule
18 9(b).

19 A. Parol Evidence Rule

20 1. Applicable Law

21 California law provides, "Terms set forth in a writing
22 intended by the parties as a final expression of their agreement
23 with respect to such terms as are included therein may not be
24 contradicted by evidence of any prior agreement of or a
25 contemporaneous oral agreement." Cal. Code Civ. P. § 1856(a).
26 However, a court is required to consider preliminarily all credible
27 parol evidence offered to prove the intention of the parties.

1 Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69
2 Cal. 2d 33, 39 (1968); see also Trident Center v. Conn. Gen. Life.
3 Ins. Co., 847 F.2d 564, 565 (9th Cir. 1988) (under California law,
4 courts must interpret any contract by first considering extrinsic
5 parol evidence even if contract is unambiguous). If, after
6 considering the evidence, the court determines that the language of
7 the contract is "fairly susceptible" to the proposed
8 interpretation, extrinsic evidence relevant to prove the meaning is
9 admissible. Pacific Gas, 69 Cal. 2d at 40.

10 Thus, the applicable law is best summarized as a two-step
11 process. First, the Court must "engage in a preliminary
12 consideration of credible evidence offered to prove the intention
13 of the parties." U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281
14 F.3d 929, 939 (9th Cir. 2002). The Court may consider subsequent
15 conduct of the parties in order to determine their contractual
16 intent. Id. at 937. Second, if the Court decides that the
17 evidence makes the contract "fairly susceptible" to an
18 interpretation contrary to its plain meaning, extrinsic evidence of
19 that contrary meaning is admissible in determining the parties'
20 contractual intent. Id. at 939. "Where the interpretation of
21 contractual language turns on a question of credibility of
22 conflicting extrinsic evidence, interpretation of the language is
23 not solely a judicial function." Morey v. Vannucci, 64 Cal. App.
24 4th 904, 912-13 (1998) (emphasis in original.) It is the
25 responsibility of the trier of fact to resolve this conflict. Id.

26 Further, the rule excluding parol evidence does not apply
27 where the external evidence is used "to establish illegality or
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1 fraud." Cal. Code Civ. P. § 1856(g). This exception is somewhat
2 limited. In Bank of Am. Nat'l Trust and Sav. Ass'n v. Pendergrass,
3 4 Cal. 2d 258, 263 (1935), where the California Supreme Court
4 stated,

5 Our conception of the rule which permits parol evidence of
6 fraud to establish the invalidity of the instrument is that it
7 must tend to establish some independent fact or
8 representation, some fraud in the procurement of the
instrument or some breach of confidence concerning its use,
and not a promise directly at variance with the promise of the
writing.

9 Cf. Continental Airlines, Inc. v. McDonnell Douglas Corp., 216 Cal.
10 App. 3d 388, 419 (1989) (stating that fraud exception to parol
11 evidence rule does not apply to allegations of promissory fraud
12 unless false promise is independent of or consistent with the
13 written instrument). For example, in Wang v. Massey Chevrolet, 97
14 Cal. App. 4th 856, 876 (2002), the court affirmed the trial court's
15 summary judgment ruling on a claim for fraud on the grounds that an
16 alleged oral agreement to allow pre-payment of a lease without
17 penalty was "directly at variance" with the written contract's
18 clear provision for a substantial charge in the event of
19 prepayment, and thus the alleged oral agreement was inadmissible.

20 Another exception to the parol evidence rule has been created
21 where "a mistake or imperfection of the writing is put in issue by
22 the pleadings" or where "the validity of the agreement is the fact
23 in dispute." Cal. Code Civ. P. § 1856(e); see also Coast Bank v.
24 Holmes, 19 Cal. App. 3d 581, 590 (1971) ("parol evidence is
25 admissible to show lack or failure of consideration"). The mistake
26 exception to the parol evidence rule occurs "where the writing
27 itself, through mistake, does not express the intention of the
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1 parties who entered into it." Hess v. Ford Motor Co., 27 Cal. 4th
2 516, 525 (2002) (quoting Pasqualetti v. Galbraith, 200 Cal. App. 2d
3 378, 381 (1962)).

4 2. Analysis

5 Plaintiff's claims rest on both oral and written
6 representations which it alleges were false, misleading or
7 mistaken. See Complaint ¶ 9 (alleging that Defendant verbally
8 indicated that the MCIM Solution would work seamlessly and
9 specified in writing an incomplete list of required hardware).
10 Defendant's argument that those alleged representations necessarily
11 rest on inadmissible parol evidence is not well-taken, and is
12 misplaced in the context of this motion to dismiss.

13 As an initial matter, in order for the Court to decide, as
14 Defendant urges, that the License Agreement was intended by the
15 parties to be a final and complete expression of their agreement,
16 the Court would have to consider preliminarily all credible parol
17 evidence, including all evidence relating to the allegations in
18 Plaintiff's complaint. Such an analysis is not possible on
19 Defendant's Rule 12(b)(6) motion. Plaintiff may be able to prove,
20 consistent with both the allegations of the Complaint and the terms
21 of the License Agreement, that the License Agreement is not a
22 complete and integrated contract. Any such conclusion would be
23 supported by the License Agreement's express reference to
24 additional documents that are not before the Court.

25 Furthermore, even assuming that the License Agreement is an
26 integrated, unambiguous instrument, Plaintiff may be able to prove,
27 consistent with both the allegations of the Complaint and the terms
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1 of the License Agreement, that some or all of the alleged false or
2 misleading representations were not in direct variance (or were
3 consistent) with the parties' written agreement. In fact,
4 Plaintiff asserts that some of the alleged representations were
5 contained within those written documents that are incorporated by
6 reference into the License Agreement. Defendant itself
7 acknowledges that it "promised that the Software would conform to
8 the specifications set forth in the Statement of Work and
9 Description." Def.'s Mot. at 9. In that event, the alleged
10 representations could be admissible under the fraud exception to
11 the parol evidence rule.

12 Finally, Plaintiff claims that the Contract is invalid due to
13 mutual mistake or failure of consideration, also circumstances
14 justifying the admission of parol evidence. Defendant has not
15 shown any reason why Plaintiff could not, consistent with the
16 Complaint and the License Agreement, show facts proving that the
17 parties were mistaken about a term or terms contained in the
18 Contract. Likewise, depending on the Court's construction of the
19 Contract as a whole, it may be that Plaintiff can state a claim for
20 rescission based on failure of consideration.

21 Therefore, the Court denies Defendant's motion to dismiss the
22 claims for rescission and intentional misrepresentation based on
23 the parol evidence rule.

24 B. Sales Talk or Puffery

25 1. Applicable Law

26 "[A]n expression of opinion or belief, if nothing more, and if
27 so understood and intended, is not a representation of fact, and
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1 although false, does not amount to actual fraud." Carlson v.
2 Brickman, 110 Cal. App. 2d 237, 247 (1952) (quoting Stockton v.
3 Hind, 51 Cal. App. 131, 136 (1921). Thus, it cannot be grounds for
4 fraud damages or rescission. Id. A "representation is one of
5 opinion if it expresses only (a) the belief of the maker, without
6 certainty, as to the existence of a fact; or (b) his judgment as to
7 the quality, value, authenticity, or other matters of judgment."
8 Gentry v. eBay, 99 Cal. App. 4th 816, 835 (2002) (quoting Rest. 2d
9 Torts § 538A) (internal paragraph marks omitted). "[P]redictions
10 of future facts are ordinarily considered nonactionable expressions
11 of opinion." Richard P. v. Vista Del Mar Child Care Serv., 106
12 Cal. App. 3d 860, 865 (1980) (finding prediction that premature
13 infant would be healthy child to be expression of opinion). A
14 seller's mere "puff talk" is also an expression of opinion that is
15 not actionable as fraud. Corbett v. Otts, 205 Cal. App. 2d 78, 83
16 (1962). However, the opinion of a party with superior knowledge
17 may be treated as a factual representation. Cory v. Villa
18 Properties, 180 Cal. App. 3d 592, 598-99, rev. denied (1986).

19 2. Analysis

20 Defendant describes the alleged representation that its MCIM
21 Solution "would work 'seamlessly' with Plaintiff's existing
22 telephony infrastructure" as a non-actionable expression of
23 opinion. Although "seamlessly" could, arguably, be shown to be
24 mere sales talk or puffery, the statement that the MCIM Solution
25 "would work . . . with Plaintiff's existing telephony
26 infrastructure" is not. Neither is Defendant's alleged false
27 representation regarding the necessary hardware or its alleged

misleading demonstration of how the MCIM Solution would work. Defendant has cited no apposite authority. Cf., e.g., InterPetro
Bermuda Ltd. v. Kaiser Aluminum Int'l Corp., 719 F.2d 992, 996 (9th Cir. 1983) (finding representation that "supplier had a reputation for dependability" to be opinion); Corbett, 205 Cal. App. 2d at 83 (representation that apartment was "very livable" and "better" than others was "seller's talk" or "puff talk"); Williams v. Lowenthal, 124 Cal. App. 179, 18 (1932) (seller's representation that phonograph machine would generate thirty dollars per month in profits found to be mere expression of opinion); Graphic Arts Sys. v. Scitex Am. Corp., No. CV-92-6997-WMB, 1993 U.S. Dist. LEXIS 21052, *25-*26 (C.D. Cal. May 26, 1993) (finding software seller's prediction of increased productivity to be opinion where productivity outcome depended on many factors under the control of plaintiffs as well as defendant). Unlike the statements found in those cases to be non-actionable opinion, Defendant's alleged representations were not nebulous predictions of value or quality. Moreover, Defendant presumably has superior knowledge of its own software system, and therefore even its expressed opinion regarding the operation of the MCIM Solution could be actionable if false. Therefore, the Court denies Defendant's motion to dismiss on this ground.

C. Pleading with Particularity

Plaintiff states in its Complaint that Defendant made certain representations in December, 2004, in connection with the parties' negotiation of the January 15, 2005 Contract in San Francisco, California. Plaintiff has also specifically described the nature

1 of the alleged misrepresentations. See, e.g., Complaint ¶¶ 9, 14.
2 The circumstances constituting fraud are stated with sufficient
3 particularity to give Defendant notice of the alleged misconduct so
4 that it can defend against the charges. Therefore, the Court
5 denies Defendant's motion to dismiss under Rule 9(b).

6 II. Negligent Misrepresentation

7 Defendant moves to dismiss Plaintiff's claim for negligent
8 misrepresentation on the grounds that (1) California law does not
9 recognize a cause of action for negligent false promise; (2) the
10 alleged misrepresentations are barred by the parol evidence rule;
11 and (3) the economic loss doctrine bars Plaintiff's claim.
12 Defendant's argument regarding the parol evidence rule is decided
13 in Section I(B) above; the other issues are addressed below.

14 A. Claim for Negligent Misrepresentation

15 "Where a defendant makes false statements, honestly believing
16 them to be true, but without reasonable grounds for such belief, he
17 may be held liable for negligent misrepresentation, a form of
18 deceit." Cicone v. Urs Corp., 183 Cal. App. 3d 194, 208 (1986)
19 (quoting Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal.
20 App. 3d 104, 111 (1976)). "To be actionable, a negligent
21 misrepresentation must ordinarily be as to past or existing
22 material facts." Tarmann v. State Farm Mutual Auto. Ins. Co., 2
23 Cal. App. 4th 153, 158-59 (1991) (internal citations omitted). In
24 Tarmann, (the case upon which Defendant relies), the court found
25 that a promise to pay money in the future was not actionable as
26 negligence because it was a misrepresentation of intention rather
27 than a misrepresentation of fact. Id. at 158-59.

1 However, the representations alleged in the Complaint do not
2 involve statements of Defendant's intention regarding its future
3 conduct. Representations such as that Defendant's MCIM Solution
4 would work within Plaintiff's existing telephony system are
5 statements about the functionality of the product, and thus are
6 actionable under a theory of negligent misrepresentation.
7 Therefore, the Court denies Defendant's motion to dismiss
8 Plaintiff's claim for negligent misrepresentation on this ground.

9 B. Economic Loss Rule

10 Under California's economic loss rule, to recover in tort for
11 damages caused by a defective product, a plaintiff must demonstrate
12 personal injury or damage to property other than the product
13 itself. Jimenez v. Super. Ct., 29 Cal. 4th 473, 483 (2002); Aas v.
14 Super. Ct., 24 Cal. 4th 627, 635-36 (2000). However, claims of
15 fraud and intentional misrepresentation that are independent of a
16 breach of contract are not subject to the economic loss rule.
17 Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 991 (2004).

18 It is possible that Plaintiff will prove facts, consistent
19 with the Complaint and the License Agreement, that support a claim
20 for negligent misrepresentation involving a breach of duty
21 independent of the Contract. This may depend in part on which of
22 Defendant's alleged representations were in fact included in the
23 Contract, which in turn depends on the scope and construction of
24 the Contract itself, an issue which is not before the Court at this
25 time. Therefore, the Court denies Defendant's motion to dismiss
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27
28

1 Plaintiff's claim for negligent misrepresentation.³

2 III. Breach of Implied Covenant of Good Faith and Fair Dealing

3 Defendant moves to dismiss Plaintiff's claim for breach of the
4 implied covenant for good faith and fair dealing on the grounds
5 that it is also based on alleged representations that are
6 inadmissible under the parol evidence rule. For the reasons
7 described in Sections I(A), Defendant's motion to dismiss on this
8 basis is denied.

9 Defendant also moves to dismiss this claim as barred, to the
10 extent that Plaintiff seeks damages beyond those for breach of
11 contract. The California Supreme Court has articulated "a general
12 rule precluding tort recovery for noninsurance breach, at least in
13 the absence of a violation of 'an independent duty arising from
14 principles of tort law.'" Freeman & Mills, Inc. v. Belcher Oil
15 Co., 11 Cal. 4th 85, 102 (1995) (internal citation omitted). Here,
16 Plaintiff may not recover in tort for breach of an implied covenant
17 of good faith and fair dealing unless Plaintiff also establishes
18 that Defendant breached an independent duty (i.e., committed
19 another tort). Because the Court finds that Plaintiff has stated a
20 claim for intentional and negligent misrepresentation, it denies

21
22 ³In another case, this Court has held that negligent
23 misrepresentation is a species of fraud, and that the economic loss
24 rule is therefore not applicable to such a claim. Kalitta Air, LLC
25 v. Cent. Tex. Airborne Systems, Inc., No. C 96-2494 CW, Order
26 Denying Def.'s Mot. for Summ. J. and Granting Pl.'s Mot. to Enforce
27 Remand, at *8-9 (N.D. Cal. Dec. 12, 2003) and Order Granting in
28 Part and Denying in Part Def.'s Mot. for J. as a Matter of Law, at
*19 (July 22, 2005). The Court certified its order to allow
interlocutory appeal of this and other holdings, and the Ninth
Circuit agreed to permit an interlocutory appeal, which is now
pending.

1 Defendant's motion to dismiss Plaintiff's request for tort damages
2 arising from its claim for breach of the implied covenant of good
3 faith and fair dealing.

4 IV. Common Count for Money Had and Received

5 Defendant moves to dismiss Plaintiff's claim for common count
6 for money had and received, on the ground that Plaintiff cannot
7 allege the necessary elements to support such a claim.

8 A common count claim is a claim based on a debt owed by a
9 defendant to a plaintiff. The circumstances in which a common
10 count for "money had or received" is available include:

11 Where the money is paid under a contract rescinded by the
12 plaintiff for ordinary mistake, fraud in the inducement, or
13 innocent misrepresentation, or ordinary incapacity. . . . [Or,
14 w]here the plaintiff elects the remedy of restitution after
15 the defendant's breach or failure of consideration, or where
16 the contract has become executed on one side by the
17 plaintiff's full performance, and he elects to plead his cause
18 of action on express contract as a common count.

19 4 B.E. Witkin, California Procedure § 522 (1997) (internal
20 citations omitted).

21 Because the Court has found in Section I above that Plaintiff
22 has stated claims for intentional misrepresentation and rescission
23 of the Contract, Defendant's arguments that Plaintiff has failed to
24 state a claim for common count are precluded. See, e.g., Shultz v.
25 Harney, 27 Cal. App. 4th 1611, 1623 (1994) (concluding that
26 plaintiff effectively stated a cause of action for money had and
27 received where contract was found to be void).

28 V. Punitive Damages

Finally, Defendant moves to strike Plaintiff's demand for
punitive damages. To the extent that Defendant's motion rests on

1 Plaintiff's alleged failure to state a claim that would support
2 punitive damages, it is denied because the Court finds that
3 Plaintiff has adequately stated its claims. As the Court noted in
4 Section III above, whether Plaintiff's claim for breach of an
5 implied covenant of good faith and fair dealing sounds in contract
6 or tort cannot be decided at this time.

7 Defendant also relies on the portion of the License Agreement
8 which bars liability for special or exemplary damages "arising from
9 this Agreement, or the use or inability to use the Software."
10 License Agreement § 6.1 (capitalization and emphasis omitted).
11 However, Defendant provides no explanation for why this portion of
12 the License Agreement would prohibit punitive damages arising out
13 of a claim such as intentional misrepresentation. See Tracer
14 Research Corp. v. Nat'l Env'tl. Serv. Co., 42 F.3d 1292, 1295 (9th
15 Cir. 1994) (concluding that arbitration clause covering disputes
16 "arising under" an agreement did not extend to cover tort claims
17 related to the agreement). Defendant provides no reasoning or
18 authority to explain why it believes Tracer Research to be
19 inapposite outside of the arbitration context. Therefore,
20 Defendant's motion to strike Plaintiff's request for punitive
21 damages is denied.

22 CONCLUSION

23 For the foregoing reasons, the Court DENIES Defendant's motion
24 to dismiss (Docket No. 6).

25 IT IS SO ORDERED.

26 Dated: 8/10/06



27 CLAUDIA WILKEN
28 United States District Judge